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IN THE

Supreme Court of the United States

OCTOBER 1962 TERM.

No. 802

CIA MAR ADRA, S.A.,

Petitioner,

against

SAMUEL MOSLEY and LIPSETT STEEL PRODUCTS, INC.,

Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Petitioner, Cia Mar Adra, S.A., respectfully prays that a writ of certiorari be issued to review the judgment of the Court of Appeals in the proceeding docketed in said Court of Appeals as No. 27651 insofar as such judgment did not consider the question of the right of petitioner to indemnity against respondent Lipsett Steel Products, Inc. and the right to include the counsel fees, costs and disbursements which petitioner was required to incur in the defense of the case as part of the judgment allowing indemnity.

This petition, however, is prayed for only in the event this Court should grant the petition for a writ of certiorari in No. 1142 at this Term. If the petition in No. 1142 should be denied, Cia Mar Adra, S.A., does not ask that the present petition be granted.

Opinions Below.

The memorandum opinion of the United States District Court for the Southern District of New York is unreported. (Appendix, page 7). The opinion of the United States Court of Appeals for the Second Circuit is reported at 314 F. 2d 223.

Jurisdiction.

The judgment of the Court of Appeals was entered on February 28, 1963. The jurisdiction of this Court is involved under 28 U. S. C., Section 1254(1).

Petitioner's application for an extension of time for filing this cross-petition to July 26, 1963 was granted by the Honorable John M. Harlan, Associate Justice of the United States, by order dated May 29, 1963.

Questions Presented.

1. Whether a shipowner which is held liable to a longshoreman because of the method or manner in which he and his stevedore employer conduct loading operations aboard a vessel and/or because of the equipment they elect to use in the conduct of their work, is entitled to be indemnified not only for all damages awarded to the injured longshoreman but also for the counsel fees, costs and disbursements it is required to expend in the defense of the case.

2. Whether a shipowner, which is awarded indemnity by a jury, is precluded from recovering the counsel fees, costs and disbursements required for the defense of the case though the issue of their assessment was not sub-

mitted for determination by the jury and was not passed upon by the jury.

Statement of the Matter Involved.

The subject matter of this cross-petition grows out of an action for damages for personal injuries by a longshoreman, which was tried before a jury in the United States District Court for the Southern District of New York. The jury awarded damages to the longshoreman against Cia Mar Adra, S.A., the petitioner herein, and in turn awarded Cia Mar Adra, S.A. indemnity for a like amount against Lipsett Steel Products, Inc., the longshoreman's stevedore employer. After the jury's verdict had been returned, Cia Mar Adra, S.A. made a timely application under Rule 59 of the Federal Rules of Civil Procedure for an order amending the judgment in its favor to include in such judgment its counsel fees and costs of the defense.

Though the issue of counsel fees and costs of defense were not submitted to the jury for resolution by them, the trial judge, nonetheless, denied petitioner's motion on the erroneous basis that petitioner had waived its right to counsel fees and costs of defense by not submitting them to the jury.

Appeals by both petitioner and Lipsett Steel Products, Inc. to the United States Court of Appeals for the Second Circuit followed. Both appealed from the judgment in favor of the injured longshoreman on questions of law. The stevedore employer also appealed from the judgment awarding indemnity against it and petitioner, from the trial judge's refusal to allow it counsel fees and expenses of defense. This phase of the appeal was conditioned on

whether or not the judgment in favor of the injured longshoreman was affirmed or reversed.

The Court of Appeals reversed the judgment in favor of the longshoreman for errors of law and remanded the case for a new trial. This determination is the subject matter of petition No. 1142 at this Term. In view of the reversal and remand for a new trial the Court of Appeals did not consider it necessary to pass on the issues raised by the stevedore's appeal from the judgment against it for indemnity and petitioner's appeal from the trial court's refusal to amend the indemnity judgment to include an award for counsel fees and the costs of defense.

In No. 1142 the injured longshoreman seeks review by this Court of the judgment of the Court of Appeals reversing the judgment below and remanding the case for a new trial. Though as has been clearly pointed out in the briefs of both Cia Mar Adra, S.A. and Lipsett Steel Products, Inc., in opposition to said petition, that review by this Court in No. 1142 of this Term is clearly unwarranted, should this Court hold otherwise, the questions involving indemnity and counsel fees and expenses of defense are vital to a complete determination of this case and it would be in the interest of justice to grant this cross-petition.

Reasons for Granting the Writ.

1. This cross-petition should be granted should the writ prayed for in No. 1142 of this Term be allowed so that all the vital issues in the action, which are necessary for a complete determination of this case, may be before the Court. As this Court noted in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, at page 89, it is precluded from resolving any questions as to the rights and liabilities of any of the parties unless they are before the court even though the issue raised

may arise in the phase of the case which is before the court. Though the issues sought to be reviewed in No. 1142 are directed only to questions relating to a shipowner's liability they cannot be isolated from the ultimate proposition that the burden falls on the company whose default caused the injury. *Ryan's Stevedoring Co.* v. *Pan Atlantic S.S. Corp.*, 350 U. S. 124, 100 L. ed. 133, 76 S. Ct. 232 (1956); *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563, 2 L. ed. 2d 491, 79 S. Ct. 438 (1958); *Crumady* v. *The Joachim Hendrik Fisser*, 358 U. S. 423, 3 L. ed. 2d 413, 79 S. Ct. 445 (1959); *Waterman S.S. Corp.* v. *Dugan & McNamara, Inc.*, 364 U. S. 421, 5 L. ed. 2d 169, 81 S. Ct. 200 (1960); *Reed* v. *Steamship Yaka*, ... U. S. ....., 10 L. ed. 2d 448, 83 S. Ct. ..... (decided May 27, 1963).

In *Crumady* v. *The Joachim Hendrik Fisser*, 357 U. S. 903, 2 L. ed. 1154, 78 S. Ct. 1150, this Court granted the cross-petition under identical circumstances.

2. The denial of petitioner's application to amend the judgment for indemnity pursuant to Rule 59 of the Federal Rules of Civil Procedure to include counsel fees and costs of defense is in conflict with decisions of this Court and other courts, both Appellate and of original jurisdiction. *Gasoline Products Co. Inc.* v. *Champlain Refining Co.*, 1931, 283 U. S. 494, 498; *Mason* v. *Mathiasen Tanker Industries, Incorporated*, 4 Cir., 1962, 298 F. 2d 28, 32; *United Air Lines* v. *Wiener*, 9 Cir., 1961, 286 F. 2d 302, 304-305; *Brown-Pacific Maxon Company* v. *Toner*, 3 Cir., 1958, 255 F. 2d 610, 611; *Yates* v. *Dann D. Del.*, 1951, 11 F. R. D. 386, 392-393; *General Electric Company* v. *Mason & Dixon Lines, Inc.*, D. C. W. D. Va., 1960, 186 F. Supp. 761, 766.

This denial also involves the construction and application of Rule 59 of the Federal Rules of Civil Procedure, a statute which concerns many cases of like nature and

requires a definitive resolution but might not be sufficiently important to warrant an independent petition for certiorari. Accordingly, if the Court determines to grant certiorari in No. 1142, it is respectfully submitted that the entire case should be reviewed and the error of the Court below be corrected with respect to the interpretation and application of Rule 59 of the Federal Rules of Civil Procedure.

Conclusion.

For the foregoing reasons, it is respectfully submitted that in the event the Court should grant the petition for a writ of certiorari in No. 1142, this petition for a writ of certiorari should likewise be granted.

Respectfully submitted,

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Memorandum Decision of Trial Court Denying Motion to Amend Judgment.

SAMUEL MOSLEY v. CIA. MAR ADRA, S. A.
CIA MAR ADRA, S. A. v. LIPSETT STEEL PRODUCTS, INC.
Civ. 127-204
June 25, 1962

Third-party Adra's motion for counsel fees is denied. Adra's claim in the case at bar was at law with trial by jury and Adra rested its case against Lipsett without offering any evidence for the jury to determine what would be a reasonable value of counsel fees.

In *DeGioia* vs. *United States Lines Company* (2nd Cir., decided June 11, 1962), the parties stipulated that the matter of attorney's fees would be left to the Court. No such stipulation was made in the case at bar. See, also, *Paliaga* vs. *Luckenbach S.S. Co.*, 301 F. 2d, 403 (2nd Cir., 1962).

So ordered:

IRVING BEN COOPER
U. S. D. J.